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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/750,402

12/31/2003

Paul T. Van Gompel

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8997

23556

7590

05/22/2007

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EXAMINER

CHAPMAN, GINGER T

ART UNIT

PAPER NUMBER

3761

MAIL DATE

DELIVERY MODE

05/22/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

## Office Action Summary

Application No.

10/750,402

Applicant(s)

VAN GOMPEL ET AL.

Examiner

Ginger T. Chapman

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3761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 27 November 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 34,38,39,43-45 and 48-51 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 34,38,39,43-45 and 48-51 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 31 December 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- ☐ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☒ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date 9/6/2006 & 2/28/2007.
- ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- ☐ Notice of Informal Patent Application
- ☐ Other: \_\_\_\_\_.

*Status of the claims*

Claims 34, 38-39, 43-45 and 48-51 are pending in the application.

*Claim Rejections - 35 USC § 103*

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 34, 38-39, 43-45 and 48-51 are rejected under 35 U.S.C. 103(a) as being unpatentable over Van Gompel et al (US 6,193,701) in view of Mishima et al (US 2002/0072726 A1).

With regard to claim 34, as seen in Figures 1-3 and 7-8, Van Gompel et al disclose a disposable absorbent garment (figs. 1 and 7) comprising: an elastic outer layer having an outer layer perimeter (c. 1, l. 46-49); an elastic inner layer (c. 15, ll. 17-30) wherein the elastic inner layer has an elastic inner layer perimeter bonded to outer layer perimeter with a plurality of ultrasonic, adhesive or thermal bonds (c. 5, ll. 40-50); and an absorbent assembly (52) including a topsheet layer (68), a core layer (70) and a barrier layer (64).

Van Gompel, at c. 15, ll. 17-30, teaches the desirability of the elastic inner layer to be stretchable and having elasticity to conform to the body of a wearer, in particular when used with an elastic outer layer (c. 1, ll. 45-50). Van Gompel teaches the article comprises a first panel comprising an extensible bodyside liner and the second panel comprises an outer cover (c. 3, ll. 46-48) and additionally teaches an elastic topsheet layer (68) of the absorbent assembly, thus

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Van Gompel teaches the desirability of extensible and elastic inner layers. Van Gompel does not expressly disclose the elastic inner layer defining an opening.

Mishima et al, at p. 1, [0003-4] expresses the desire for the elastic inner layer to have an opening to prevent body waste held on the surface of the elastic inner layer from sticking to the wearer's skin. As seen in Figure 1, Mishima et al disclose an elastic inner layer (7) defining an opening (8). Therefore it would have been obvious to one having ordinary skill in the art at the time the invention was made to form the elastic inner layer of Van Gompel defining an opening as taught by Mishima et al, since Mishima states at p. 3, [0040] that the advantage of forming a diaper with this design is that such an opening minimizes the problem of body waste held on the elastic inner layer sticking to the wearer's skin thereby providing a cleaner more sanitary diaper.

With regard to claim 38, Van Gompel discloses outer layer but does not expressly disclose the outer layer is liquid impermeable. Mishima et al, at p. 4 [0055-56] teaches the ability of the outer layer to be liquid impermeable and have high strength and flexibility to improve fit and reduce leakage thus disclosing the desire for a liquid impermeable outer layer. As seen in Figure 1, Mishima et al teach a diaper having a liquid impermeable outer layer. Therefore it would have been obvious to one having ordinary skill in the art at the time the invention was made to form the outer layer of Van Gompel liquid impermeable as taught by Mishima since Mishima state at [0056] that the benefit of forming a diaper with such an outer layer is that it has high water resistant properties, high strength and flexibility.

With regard to claim 39, Van Gompel et al disclose, at c. 7, ll. 59-61, that the outer layer can be a nonwoven spunbonded polypropylene fabric composed of or formed into a web; nonwoven fabric is inherently liquid permeable. In the absence of any teaching that the

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nonwoven fabric is treated to render the fabric liquid impermeable, the examiner has a sound basis for believing that the material comprising the outer layer is inherently liquid permeable, thus the burden has shifted to Applicant to come forward with evidence establishing that the material is not liquid permeable.

With regard to claims 43-45, Mishima et al disclose the elastic inner layer (7) is elastic in both a longitudinal and lateral direction (p. 2, [0028]), is liquid impermeable [0025] and includes two or more layers of materials [0031].

With regard to claims 48 and 49, Mishima et al disclose the outer layer (5) length is greater than the inner layer (7) length and the outer layer (5) width is greater than the inner layer (7) width [0037, 0043-45; fig. 3].

With regard to claim 50, Van Gompel et al disclose the perimeter bonded area has a percentage of bonded area to unbonded area of from 10 to 40 (c. 3, ll. 30-35 and ll. 60-66; c. 11, ll. 50-65; c. 15, ll. 50-55).

With regard to claim 51, as best depicted in Figure 2, Van Gompel et al disclose the absorbent assembly (52) is attached (62) to outer layer (24) along a lateral centerline of absorbent assembly (52).

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

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A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 34, 38-39, 43-45 and 48-51 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-46 of copending Application No. 10/749,761. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims of each application describe and claim substantially identical dual layer garments and are coextensive in scope.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

### ***Response to Arguments***

Applicant's arguments filed 27 November 2006 have been fully considered but they are not persuasive.

Applicant argues the following:

I. Applicant argues that each reference, Van Gompel and Mishima, must each individually teach all of the limitations of independent claim 34.

Applicant submits that claim 34 requires 5 elements: 1. an elastic inner layer with an opening, 2. a topsheet layer, 3. an absorbent core layer, 4. a barrier layer and 5. an elastic outer layer. Applicant argues that Van Gompel teaches elements 2-5 while Mishima teaches elements 1-4, i.e. that Van Gompel does not teach an elastic inner layer with an opening and Mishima does

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not teach an elastic outer layer, thus each reference teaches only four out of the five limitations. Applicant argues that the combination of Van Gompel and Mishima do not disclose all claim limitations because each reference must individually teach all five limitations of independent claim 34.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

As noted by Applicant, Van Gompel teaches 1. an elastic inner layer without an opening, 2. a topsheet layer, 3. an absorbent core layer, 4. a barrier layer and 5. an elastic outer layer.

As noted by Applicant, Mishima teaches 1. an elastic inner layer with an opening, 2. a topsheet layer, 3. an absorbent core layer, 4. a barrier layer, but does not teach an elastic outer layer.

Examiner maintains that the combination of references teach 1. an elastic inner layer with an opening, 2. a topsheet layer, 3. an absorbent core layer, 4. a barrier layer and 5. an elastic outer layer, and therefore the combination of references contain all of the claimed limitations and thus the scope and contents of the prior art contain all that is claimed. Further, Van Gompel and Mishima are analogous art, and are directed to the problem of improving the fit of a diaper in order to reduce the risk of leakage.

The examiner has maintained the provisional obviousness-type double patenting rejection made of record in the previous Office action mail date 3 November 2004.

*Conclusion*

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ginger T. Chapman whose telephone number is (571) 272-4934. The examiner can normally be reached on Monday through Friday 9:30 a.m. to 6:00 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tatyana Zalukaeva can be reached on (571) 272-1115. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.



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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Ginger Chapman  
Examiner, Art Unit 3761  
05/16/07



TATYANA ZALUKAEVA  
SUPERVISOR/PRIMARY EXAMINER

